(7)

No. 98-1037

In The

Supreme Court of the United States

October Term, 1998

GEORGE SMITH, Warden,

Petitioner,

v.

LEE ROBBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The California Academy of Appellate Lawyers is an organization of over 100 appellate practitioners from throughout the state of California which concerns itself with issues in the appellate process.[1]

There are Academy members among those accepting appointments from the California state appellate courts to represent indigent clients in appeals from criminal convictions, among the members of the state's Appellate Indigent Defense Oversight Advisory Committee which reports to the Chief Justice of the California Supreme Court, and among those employed in the administration of California's appellate "projects." These five offices are nonprofit organizations which contract with the state Administrative Office of the Courts to administer the panel of attorneys who accept appointments in non-capital indigent criminal appeals in each of the six California Court of Appeal districts. Among other duties, each "project" (1) develops and maintains a panel of private attorneys who wish to accept indigent criminal appointments in the district, (2) matches attorneys to appellate cases based on the perceived difficulty of the case and the experience and skills of counsel, and (3) reviews and evaluates the work of counsel to provide quality control and to inform future appointments.

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[1] In conformity with Rule 37.6, the California Academy of Appellate Lawyers informs the Court that no counsel for any party to this matter authored the brief in whole or in part, and that no person or entity other than the Academy made a monetary contribution to the preparation or submission of the brief.

Inasmuch as the decision of the Ninth Circuit Court of Appeals in this case would invalidate the existing procedure for "no-merit" appeals in California cases involving indigent defendants, the Academy and its members are immediately affected by it and concerned about the impact it will have on the California appellate system.

The parties to this matter have consented to the filing of this amicus brief as provided in Rule of Court 37(a).

SUMMARY OF ARGUMENT

In *Anders v. California*, 386 U.S. 738 at 744 (1967), this Court held that the Fourteenth Amendment gives the indigent criminal defendant the right to counsel on appeal who "support his client's appeal to the best of his ability" even when appellate counsel concludes that the appeal is "wholly frivolous . . . " In the decades since *Anders*, California's courts have developed a process for dealing with no-merit appeals which ensures that the goal this Court set in *Anders* is met with a high degree of efficiency and effectiveness. The California process, as it operates under *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839 (1979):

> (1) supplements the full judicial review of the record required by *Anders* in no-merit cases with an additional layer of review through the system of "appellate projects" which provide monitoring, assistance and support of appointed counsel on appeal,

> (2) requires counsel to write a brief presenting the facts of the case to the appellate court without declaring the appeal to be frivolous or arguing against her client, and, therefore,
>
> (3) does not require counsel to withdraw after filing the no-merit brief. California thus provides *heightened* review through its system of assisted appellate counsel, and makes it possible to ensure indigent defendants continuity of counsel in such cases.

California's process thus offers effective protection for the due process and equal protection rights of indigent defendants while promoting judicial efficiency. The California system should be preserved; and the decision of the Ninth Circuit Court of Appeals which condemns it must therefore be reversed.

ARGUMENT

CALIFORNIA'S PROCEDURE FOR HANDLING NO-MERIT APPEALS IN NON-CAPITAL, CRIMINAL CASES MEETS THE GOAL OF THIS COURT'S *ANDERS* DECISION EFFECTIVELY AND EFFICIENTLY.

A. *Anders* and its progeny.

In *Anders v. California*, 386 U.S. 738, *supra*, this Court first concerned itself with

> "the scope of court-appointed appellate counsel's duty to an indigent client after counsel has conscientiously determined that the indigent's appeal is wholly frivolous."

McCoy v. Court of Appeals of Wisconsin, 486 U.S. 42º at 430 (1988).

This Court held in *Anders* that even in such a case, the Fourteenth Amendment requires that appointed counsel "support his client's appeal to the best of his ability," 386 U.S. at 744, in order to

> "assure penniless defendants the same rights and opportunities on appeal – as nearly as is practicable – as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel."

386 U.S. at 745.

The specific question in *Anders* was whether appointed counsel could "withdraw by simply advising the court of his or her conclusion" that the appeal was frivolous. This Court held in response that counsel should be allowed to withdraw only after filing "a brief referring to anything in the record that might arguably support the appeal." *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 430, quoting *Anders v. California*, 386 U.S. at 744, *supra*. This Court went on to explain in *McCoy* that the purpose of an Anders brief is to give the appellate court a sound basis for conclusions on two issues:

> "First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous."

486 U.S. at 440.

In *McCoy*, this Court considered whether Wisconsin's procedure for dealing with no-merit appeals met this standard. Wisconsin's rules required that an appointed attorney finding an appeal frivolous and seeking withdrawal not only state "anything in the record that might arguably support the appeal," but also "a discussion of why the issue lacks merit." 486 U.S. at 431. This Court found that the additional requirement, while not necessary to meet the demands of "substantial equality and fair procedure" embodied in the Fourteenth Amendment, is not inconsistent with them. 485 U.S. at 435-36. The Court thus made it clear that *Anders* not require lock-step uniformity in State responses to the need for due process in no-merit appeals.

In *Penson v. Ohio*, 488 U.S. 75 (1988), on the other hand, this Court found that the Ohio procedure did not meet the *Anders* standard because the Ohio court (1) allowed counsel to withdraw before determining whether counsel's evaluation of the appeal as frivolous was sound, and (2) decided the appeal on the merits without appointing new counsel after finding arguable appellate issues.

B. The California process for no-merit appeals.

This Court demonstrated in *McCoy* and *Penson* that *Anders* did not establish a rigid formula for dealing with no-merit appeals with which all states would have to comply, but a guideline which allows each state to fashion its own procedure, provided that it gives indigent defendants the "substantial equality and fair procedure" required by the Fourteenth Amendment. 485 U.S. at 435.

The California procedure is different from those previously considered by this Court in that it allows counsel who find no arguable issues to remain on the case rather than withdraw. Like the Wisconsin procedure found sufficient by this Court in *McCoy*, however, the California process fully meets the requirements of due process and equal protection.

Under California's procedure, counsel who are unable to find any arguable issues in the record are required to prepare a brief setting forth the facts and procedural history of the case and requesting that the court conduct an independent review of the record. *People v. Feggans*, 67 Cal.2d 444, 447-448, 62 Cal.Rptr.2d 444 (1967); *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839 (1979); *In re Sade C.*, 13 Cal.4th 952, 55 Cal.Rptr. 771 (1996). The court then conducts such a review, and if it finds that an arguable issue exists, instructs counsel to brief that issue for the court. Alternatively, new counsel may be appointed for this purpose. *Wende*, 25 Cal.3d, at p. 442.

Wende expressly prohibits counsel from arguing against their clients, *id.*, 25 Cal.3d, at 440, and states that an attorney who declares the appeal to be frivolous is disqualified and must request withdrawal. However, it also allows counsel to avoid disqualification by simply presenting the case to the court without argument and without declaring the appeal to be frivolous, thereby making continuity of representation possible in case the appellate court does find arguable issues. *Id.*, at p. 442. Consistent with that approach, *Wende* does not require

appointed counsel to list the issues which counsel considered and rejected, or to cite authorities supporting counsel's decision not to brief those issues. *Ibid.*

The State's Administrative Office of the Courts has contracted with five appellate projects (nonprofit organizations with independent directors) to administer indigent criminal appeals arising in each of California's appellate districts. The projects, staffed by attorneys who specialize in criminal appeals, arrange for the appointment of counsel with skills and experience appropriate to the complexity of the particular case and then monitor counsel's representation as the case progresses.

Appointed counsel are prohibited from filing no-merit briefs without first consulting with the projects, and, as a matter of standard practice, a project staff attorney reviews the record (or selected portions of it) first before a *Wende* brief is filed. The project attorney's review searches not just for clearly reversible errors but, as defense advocates, for any "arguable" issues. Thus, this process provides a significant additional level of protection in assuring competent representation in non-capital, indigent criminal appeals.

Petitioner has ably made the legal arguments in support of the issuance of the petition. Accordingly, amicus will not reargue the legal issues discussed by petitioner, but will instead attempt to assist the court by providing additional information regarding California's system of appellate projects, the procedures employed in California no-merit appeals, and the manner in which this state has

balanced the needs of the courts, the constitutional interests of indigent appellants, and the duties of loyalty and confidentiality which counsel owe to their clients.

1. The California appellate project system.

In 1967, when *Anders* and *Feggans* were decided, indigent criminal appeals in California were administered directly by the California Courts of Appeal. The courts themselves appointed private counsel, decided the appeals, and compensated counsel for their services. In no-merit appeals prior to *Anders* and *Feggans*, counsel submitted a no-merit letter and the case was concluded. After these two cases were decided, counsel was required to prepare a brief to assist the court, and the court conducted its own independent review of the record to ensure no arguable issues had been missed. *Wende*, 25 Cal.3d, at p. 440.

In 1985 the California Judicial Council adopted California Rule of Court 76.5, which authorized the Courts of Appeal to "contract with an administrator having substantial experience in handling criminal appeals" to handle the administrative functions formerly performed by the courts themselves. See also, Standards of Judicial Administration, Std. 20. Within a few years, appellate projects were established to administer indigent appeals in all six California appellate court districts.

All non-capital indigent criminal appeals in California are now administered through the appellate project system, as are most appeals in civil juvenile delinquency and dependency proceedings. The projects currently

administer a caseload of approximately 10,000 appeals each year. This represents more than half of all the appeals – civil and criminal – filed in all appellate districts in the state of California. *Court Statistics Report*, Judicial Council of California, vol. 1, p. 24 (1998). The projects perform a large number of administrative and training services and also provide direct representation in some cases.

Every notice of appeal filed by a defendant who has been convicted of a criminal offense is referred by the respective Court of Appeal to the appropriate appellate project. The project then conducts an initial review of the case and matches the case with an attorney whose skill and experience are appropriate to the particular case.

This "matching" function is one of the most critical services which the projects provide. The projects maintain individual panels of attorneys who are ranked in categories ranging from Level 1, comprising those attorneys who are essentially beginners, to Level 5, comprising the most skilled and experienced attorneys. The projects share information regarding their respective panels, and each panel attorney's work product is evaluated in every case to determine whether the attorney's current ranking is appropriate.

Upon receiving the notice of appeal in a case, the projects evaluate the case and categorize it according to a variety of factors, including the nature of the charges of which the appellant was convicted, the length of the sentence imposed, whether the case was tried to the court or a jury, the length of the record, and a number of other considerations. The project then contacts an attorney in

the appropriate skill category and assigns the case to him or her.

The projects assign cases on either an "independent" or an "assisted" basis. In an "independent" case, the panel attorney provides all legal services required by the case, but also sends a copy of each document which has been filed with the court to the assigning project. The staff attorney reviews these documents in order to prepare an evaluation of the attorney's work and to evaluate the attorney's claim for compensation. In addition, panel attorneys in independent cases are encouraged to consult with the project staff attorney assigned to the case on difficult legal or ethical issues which may arise.

Only relatively skilled and experienced attorneys are assigned cases on an "independent" basis, roughly 60% of the cases. The remaining 40% of the cases are assigned to relatively less experienced attorneys on an "assisted" basis. In an "assisted" case, an experienced project staff attorney conducts an extensive initial review of the record and prepares a memorandum to the panel attorney on issues the project attorney has identified. The panel attorney then separately reviews the record, and prepares a draft of the opening brief. The opening brief is then reviewed by the project attorney prior to filing. The project attorney also reviews other documents, such as reply briefs and petitions for review, and may attend oral argument in order to monitor the attorney's performance.

The development of the project system has greatly professionalized criminal appellate practice in California. In addition to the individual case instruction, the projects also provide resource materials and regular training, or

continuing legal education, sessions for panel members on both substantive and procedural topics. The courts maintain ongoing supervision of the appellate project system through the California Judicial Council and the Administrative Office of the Courts, the administrative arm of the California judicial branch. In addition, the chief justice of the California Supreme Court has created a 10-member Appellate Indigent Defense Oversight Advisory Committee, comprised of six appellate court justices, two appellate project directors, and two appellate practitioners, to monitor the work of the projects. This committee meets on a quarterly basis and performs a detailed audit of randomly selected, recently closed cases within the appellate project system; this audit is addressed to both the nature of work and hours billed by appointed counsel and to the administrative oversight provided by the projects. Based on its review of California's non-capital, appointed appellate counsel system, the committee reports its recommendations regarding potential changes in the system to the Chief Justice of California and the Administrative Presiding Justices of the California Courts of Appeal.

2. California's procedure in no-merit appeals.

The degree of project supervision in *Wende* cases depends upon whether the case has been assigned on an "independent" or an "assisted" basis.

In an "independent" case, the attorney may not file a *Wende* brief without first consulting the project staff attorney and receiving permission to file a no-merit brief. As a matter of standard practice, either the panel attorney will

request that the project attorney review the entire record or selected portions of it or the project attorney will make that request. This provides a second opinion regarding issues the panel attorney has considered and rejected.

In an "assisted" case, the project's review is much more involved. Not only must the panel attorney consult with the project attorney before filing a no-merit brief, the project staff attorney will also normally conduct a complete review of the record to ensure that the panel attorney has not missed any arguable issues. Only then may the attorney file a brief requesting that the court review the record to determine whether there are any arguable issues.

The California appellate project system provides at least as much, and perhaps more, protection of the Sixth Amendment interests of indigent criminal appellants as this court contemplated at the time of *Anders*. The system first provides "front-end" insurance that the attorney appointed to represent an indigent appellant has the appropriate qualifications, training, and skills to provide legal services in each case. The system also provides additional "back-end" protections. If a complete review of the record and the relevant authorities convinces the panel attorney that a no-merit brief is appropriate, his or her decision is again reviewed by the appellate project staff attorney before any such brief is filed. Only then is the case finally presented to the Court of Appeal, which conducts its own independent review of the record to determine whether the panel attorney and the project attorney have missed any arguable issues.

In reality, the California system provides the indigent appellant with not merely one review by a competent attorney but two, plus, pursuant to *Anders*, an additional review of the record performed by the Court of Appeal. Appointed counsel's decision is second-guessed by the appellate project staff attorney, and their judgment is then "third-guessed" by the court itself.

The California courts have concluded that the requirements of *Wende*, when coupled with the project review process, results both in thorough record review and protection of indigent appellants' Sixth Amendment rights. *In re Sade C.*, 13 Cal.4th at pp. 980-981, 990-991. This point was made explicit in three recent decisions of the California Court of Appeal:

> "Pursuant to rule 76.5, and with funding from the Legislature, the Judicial Council provided each Court of Appeal with an appellate project administrator and experienced staff to administer the court-appointed counsel program for each court. (It bears noting that this has been done at a not-inconsiderable cost to the taxpayers. In fiscal 1993-1994, for example, the cost for the appellate project statewide was approximately $11 million or nearly one-third of the total outlay for court-appointed counsel in the Courts of Appeal.)
>
> The agency which operates in this District is the First District Appellate Project (FDAP). We are confident that FDAP employs both able and experienced lawyers in criminal law to assist and, where appropriate, supervise appointed counsel. FDAP and, as we understand it, the other appellate project administrators, are under contract to the court; their contractual duties

include review of the records to assist court-appointed counsel in identifying issues to brief. If the court-appointed counsel can find no meritorious issue to raise and decides to file a Wende brief, an appellate project staff attorney reviews the record again to determine whether a Wende brief is appropriate. Thus, by the time the Wende brief is filed in the Court of Appeal, the record in the case has been reviewed both by the court-appointed counsel (who is presumably well qualified to handle the case) and by an experienced attorney on the staff of FDAP. In our view, this double review provides more than sufficient assurance that the record in each respective appeal has been carefully examined for error and, therefore, that a conclusion by counsel that the appeal is without merit is one upon which this court can and should rely."

(*People v. Hackett*, 36 Cal.App.4th 1297, 1311-1312 (1995).)

> " . . . when we receive a *Wende* brief from one of these [attorneys appointed through the project process], we are assured that in fact the record has been sifted, potential issues for review have been analyzed, and the conclusion reached that there are no issues for review is professionally sustainable. Beyond this, we know that before a *Wende* brief is submitted it, as well as the record on which it is based, has been reviewed by an experienced [project attorney]."

(*In re Angelica V.*, 39 Cal.App.4th 1007, 1015 (1995).)

Finally, the California Court of Appeal, Second Appellate District (the court in which the instant case arose) has voiced similar confidence in the projects' *Wende* review procedures. In a 1995 case, Division Three

of that court, in an opinion by Associate Justice Walter Croskey, noted that the California Appellate Project/Los Angeles "employs some of the state's most able and experienced lawyers in criminal and juvenile law to assist and, where appropriate, supervise appointed counsel." It is these lawyers who review the record before a *Wende* brief is submitted. (*In re Sade C.*, 38 Cal.Rptr.2d 822, 835, fn. 16 (1995).[2])

C. California's current process for no-merit appeals meets the *Anders* standard.

In its opinion below, the Ninth Circuit found the California process objectionable because California does not require appointed counsel to list the issues which counsel considered and rejected, or to cite authorities supporting counsel's decision not to brief those issues. *Robbins v. Smith*, 152 F.3d 1062, 1067 (9th Cir. 1998). The Ninth Circuit's error was to look at that particular facet of the California system in isolation from the system as a whole, and to conclude that the California process cannot stand because this Court has held in previous cases that States must require appointed counsel to present the appellate court with a discussion of issues considered and rejected before withdrawing from the case.

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[2] The Court of Appeal version of *Sade C.* was superseded by a grant of review and subsequent decision of the California Supreme Court. Under California Rule of Court 976, the case may not be cited as authority. Reference to the footnote discussed in the text is included here for reasons unrelated to the holding of the case.

The Ninth Circuit's approach ignores the crucial fact that the current California system is fundamentally different from those previously reviewed by this Court. While in all of the systems previously reviewed appointed counsel respond to no-merit appeals by declaring them to be frivolous and withdrawing from the case, California now has an integrated system which provides, not for withdrawal of counsel, but for continuity of representation for indigent defendants by counsel assisted and supported by the Appellate Projects.

The *Wende* court recognized that there are sound practical reasons for preserving continuity of counsel in no-merit as in other cases. *Ibid.*; see, also, *Suggs v. United States*, 391 F.2d 971, 977-978 (D.C. Cir. 1968); ABA Project on Standards for Crim. Justice, Stds. Relating to Crim. Appeals (Approved Draft 1970) std. 3.2. *Wende* therefore makes it possible for counsel in no-merit appeals to stay on the case by allowing them to present those appeals to the appellate courts *without* having to disable themselves from continuing as counsel by declaring the appeals to be frivolous or otherwise discussing the weakness of the indigent appellant's case.

If counsel has disabled himself from continuing on a case and the court discovers an arguable issue which counsel missed, new counsel must be appointed to brief the issue. To do so, this successor attorney must review the same appellate record which the original attorney has already reviewed, and appellate records often run into the thousands of pages and require many hours to review. Successor counsel must also establish a working relationship with the client. All of these services are both

time-consuming and costly, since the court must ultimately compensate both attorneys.

The California procedure avoids other ethical complications as well. For example, when an appointed attorney concludes there are no arguable issues on appeal and submits the case to the Court of Appeal, the court is then placed in the awkward position of reviewing a record to locate legal issues which it must then eventually decide. Indeed, this problem was raised in the dissent of California Supreme Court Justice William Clark when *Wende* itself was decided.

> "The majority now require an appellate court to abandon its traditional role as an adjudicatory body and to enter the appellate arena as an advocate. Whatever the right of a person convicted of crime to an appeal, an appellate court cannot be burdened first, with determining what contentions should be urged on appeal and then, with resolving those contentions."

(*People v. Wende*, 25 Cal.3d at pp. 443-444 [conc. and dis. opn. of Clark, J.]; see, also, *People v. Hackett*, 36 Cal.App.4th 1297, 1302, *supra*.)

The review performed by California's appellate projects helps to insulate the courts from being placed in this difficult position. The appellate project staff attorney who performs the second review shares the ethical obligations to the client which apply to the appointed attorney himself.

The importance of this consideration should not be underestimated. An attorney is sometimes obliged not to

raise an issue which might otherwise appear to be arguable or even meritorious due to information outside the record on appeal or instructions he has received from his client. Appointed counsel can share this information with project staff counsel without breaching his duty to the client, and staff counsel can consider that information in reviewing the appointed attorney's decision. Of course, neither attorney could ever share such information with the court itself without violating the duty of confidentiality.

In addition, the projects' ethical duties to the client place them in a better position than the courts themselves to acquire a complete grasp of the appellant's case. Not only may the projects communicate with appointed appellate counsel, they may also communicate with trial counsel to obtain information which does not appear on the face of the record itself but which may affect the decision to raise or not raise particular issues. The courts are not in this position. Indeed, trial counsel's duty to protect his client's interests prohibit him from communicating with the court on such issues. Accordingly, the projects provide an additional safeguard of indigent appellants Fourteenth Amendment rights.

CONCLUSION

California's procedure in non-capital, no-merit cases achieves the goal set by this Court for the representation of indigent criminal appellants in no-merit appeals. Taken as a whole, it provides California's appellate courts with

a sound basis for ensuring that "the attorney has provided the client with a diligent and thorough search of the record for any arguable claim," and that "counsel has correctly concluded that the appeal is frivolous." The decision of the Ninth Circuit to the contrary should be reversed.

Dated: April 22, 1999

Respectfully submitted,

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